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NO. 90-1875

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

EUGENE C. BARD, et al.,

Petitioners,

vs.

DONALD L. CROCKETT,et.al.,

Respondents.[1]

CERTIFICATE OF SERVICE

PETITIONERS' REPLY TO JOINT

RESPONDENTS'[2] BRIEF IN OPPOSITION

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vs.

DONALD L. CROCKETT, et. al.,
Respondents[1]

CERTIFICATE OF SERVICE

Eugene C. Bard, James F. Bard and Max L. Bard, pro se petitioners in the above captioned case declare and certify under penalty of perjury under the laws of the United States that on this 17th day of July, 1991, a true and correct copy of the above and foregoing:

PETITIONERS' REPLY TO JOINT RESPONDENTS BRIEF IN OPPOSITION

to all respondents and their attorneys to be served was mailed by being deposited in the United States Mail,

with the proper prepaid first class postage thereon, at the Seneca, Missouri post office, to the following list:

1. ROBERT L. BRADLEY OF BLANCHARD, VAN FLEET, MARTIN, ROBERTSON, DERMOTT, 320 W. 4TH STREET, P.O. BOX 1626, JOPLIN, MO 64802, ATTORNEY FOR DEFENDANTS: DONALD L. CROCKETT (2), BURL F. HAMILTON (3), CROCKETT OIL CO. (4), JOPLIN OIL COMPANY(5). 1-417-623-1515

2. GLENN A. BURKHART OF MANN, WALTER, BURKHART, WEATHERS & WALTER, 300 JOHN Q. HAMMONS PARKWAY, SUITE 600, SPRINGFIELD, MO 65806. 1-417-862-7037 AND

3. JOHN A. VERIN III OF ARMSTRONG, TEASDALE, SCHLAFLY, DAVIS, DICUS, 1700 CITY CENTER SQUARE, 1100 MAIN STREET, KANSAS CITY, MO 64105, ATTORNEYS FOR DEFENDANTS: CONOCO, INC.(6), E.I. DUPONT DE NEMOURS AND COMPANY, INC. (7). 1-816-221-3420

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NO. 90-1875

IN THE
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EUGENE C. BARD, et al.,

Petitioners,

vs.

DONALD L. CROCKETT, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO JOINT RESPONDENTS' BRIEF IN OPPOSITION

Petitioners, Bards, respectfully pray that the Court grant the Petition For Writ of Certiorari to review the Eighth Circuits' Order entered May 10, 1991.

STATEMENT OF THE CASE

On March 17, 1989, petitioners Bards filed their pro se RICO complaint in the United States District Court, for

the Western District of Missouri against thirty-six defendants. Upon the motion of several defendants, the District Court ordered plaintiffs to file a more detailed complaint. After plaintiffs' filed their Second Amended Complaint the district court granted defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds that plaintiffs failed to plead "facts indicating an enterprise for purposes of RICO". App. 11. In a per curiam opinion the Eighth affirmed.

REASONS FOR GRANTING THE WRIT

I. Petitioners' Second Amended Complaint should not have been dismissed where it was not clear beyond doubt that Petitioners could prove no set of facts regarding an "enterprise" in civil RICO action.

The court should grant the writ for the following two reasons. First, petitioners request review of a dismissal of their civil RICO complaint in absence of a clear and certain nature

of the insufficiency of allegations of an enterprise. Second, the need to establish uniformity to assure predictabilty and clarity, regarding the Eighth Circuits' conflicting position with other circuits, as to the sufficiency of pleading an enterprise, in a civil RICO cause of action.

The Eighth Circuits' decision dismissing petitioners' complaint, is in conflict with cases from other circuits, regarding the clear and certain nature of the insufficiency of allegation of enterprise in a civil RICO action. The Eighth Circuit's inflexible approach of fixing in advance the methods of proving a civil RICO action, is in derogation to the language of the act, where at the pleading stage it is unclear whether petitioners could prove no set of facts consistent with their allegations.

The Supreme Court has not decided the sufficiency of a pleading of an "enterprise", in a civil RICO action, although in H.J.Inc., v. Northwestern Bell Telephone Co. et.al, 106 L Ed 2nd 195 (1989), this Court ruled on the sufficiency of pleading a civil RICO

action involving the "pattern" and "conduct" elements of the Act, pertaining to a 12(b)(6) dismissal. The RICO act defines what relationships/associations are included, in an "enterprise", rather that what an "enterprise" means. SURELY, Congress purposely left open other relationships/associations that could include an "enterprise". Conversely, the Eighth Circuit, unless the Court grants a writ to review, pre-fixes limitations on civil RICO, that are found no where in the act.[1]

Other Circuits follow the basic liberal notice pleading rules set forth in Rule 8 FRCP, not requiring such stringent detailed pleadings regarding

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[1] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.A. 1961 (4).

an "enterprise." Federal Insurance Co. vs. Ayers 741 F. Supp. 1179 E.D. Pa 1990. 2

See Lewis vs. Sporck, 612 F. Supp. 1316 (D.C. Cole 1985). See U.S. vs. Masters 924 F2d 1362 (7th circuit 1991). 3

The Ninth Circuit in U.S. vs. Zemeck, 634 F2d 1159, 1167 (9th circuit 1980), stressed the broad scope of the enterprise definition, and the unnecessary stringency of pleading details of an enterprise. The Fifth

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2 See Leville Industries Machinery Corp. vs. Southmost Machinery Corp. 742 F. 2d 786, 790 (3rd cir. 1984) Holding that the three elements necessary to prove the existence of a RICO "enterprise" are not necessary to plead the existence of a RICO enterprise..... A plaintiff need only identify the enterprise so as to put the defendants on notice of the claims against them.....

3....Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be RICO enterprises too.....U.S. vs. Masters, supra, at page 1366.

Circuit's position, even as to proving enterprise, holds (jury entitled to infer existence of an enterprise from largely or wholly circumstantial evidence). U.S. vs. Elliott, 571 F2d 880, 897-900 (5th Circuit).

Petitioners request for review is worthy of the court's attention. The District Court should not have dismissed petitioners' complaint, where defendants were put on notice of "enterprise" allegations at the pleading stage and it is unclear whether petitioners could prove any set of facts consistent with their allegations.

The Eighth circuit cases of Bledsoe & Flynn, are inapplicable to this case,[4] as they decided

[4] Petitioners Second Amended Complaint alleges that defendants were a group of individuals associated in fact, as well as a separate source of their command enterprise, and the structural perimeters thereof. See Page 12 of Petitioners Application to their Application for Writ.

sufficiency of proof of criminal RICO offenses, rather than sufficiency of pleading a civil RICO action.

Simply stated, the Eighth Circuit's dismissal of petitioners complaint, for insufficiency of enterprise allegations, was not clear, certain and beyond a doubt, that they could prove no set of facts in support of their civil RICO claim, at the pleading stage of litigation.[5]

The Eighth Circuits' dismissal of petitioners Second Amended Complaint is in conflict, with this court's opinion in H.J. Inc. vs. Northwestern Bell Telephone Co., et.al. 106 L Ed 2d 195, regarding sufficiency of pleading a

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[5] In review of a dismissal pursuant to FRCP 12 (b) (6), we accept as true all well pleaded factual allegations and make all reasonable inferences in favor of plaintiff. Cruz v. Beto, 405 U.S. 319.

"...of [A] complaint may be affirmed only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.
H.J. vs. Northwestern Bell Telephone Company et. al. 492 U.S., 106 L Ed 195, 109 S Ct...".

RICO's civil cause of action, dismissing the complaint under Rule 12 (b) (6) F.R.C.P. H.J. Inc., supra, focused on the "pattern" and "conduct" elements of the Act, regarding the clarity of the insufficiency of allegations, under a Rule 12 (b) (6) dismissal. H.J.'s reasoning condemned the Eighth Circuits' inflexible approach of advance judicial fixing methods available to prove RICO civil actions. 6

It is reasonable to infer that at the pleading stage of petitioners complaint, that it was not clear and certain petitioners complaint regarding enterprise, was insufficient to state a civil RICO action, and that petitioners request for review is worthy of the courts' attention, and is a viable existing controversy unlike the moot question in the inapplicable case of

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6 H.J. Inc. vs. Northwestern Bell Telephone Co., et. al 106 L Ed 2nd 195 (1989) requires a flexible approach judicially. At page 202 there of... nor is there any language suggesting that RICO's scope should be to acts of an association rather than an individual acting alone.

The Monrosa vs. Carbon Black Exports. 359 U.S. (1959). [7] Even the same evidence in proving a Rico violation may be used to establish both the element of an enterprise and the element of a pattern of racketeering. U.S. vs. Turkett, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L Ed 2d 246 (1981). U.S. vs. Bognaiol 665 F2d 877 (1981).

[7] The Monrosa vs. Carbon Black Export 359 U.S. (1959) case was where after a writ was granted on oral argument, the granting of the writ was determined improvident where the question presented had become moot due to conduct and stipulations by the litigants.

The Court of Appeals for the Eighth Circuit erred in affirming the District Court's dismissal of plaintiffs' Amended Petition for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, this Court should grant petitioners' request for review to establish a uniform point of law, regarding the sufficiency of allegations of the "enterprise" element, in a civil RICO action, at the pleading stage, due to the Eighth Circuit's conflicting position thereto, with the other circuits.

Respectfully submitted,

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